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2 United States Bankruptcy Judge  
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December 20, 2005

MARK L. HATCHER  
CLERK U.S. BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA  
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DEPUTY

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9 **UNITED STATES BANKRUPTCY COURT**  
10 **WESTERN DISTRICT OF WASHINGTON AT TACOMA**

11 In re:

12 DEANE DeLAVERN and LINDA DELAVERN,  
13 Debtors.

14 KATHRYN ANN ELLIS, In Her Capacity As  
15 Duly Appointed Chapter 7 Trustee,

16 Plaintiff,

17 v.

18 FORD MOTOR CREDIT COMPANY, a  
19 Delaware corporation doing business in the  
20 State of Washington,

21 Defendant.

Case No. 05-41964

Adversary No. 05-04153

**MEMORANDUM DECISION**

**NOT FOR PUBLICATION**

22 THIS MATTER came before the Court on December 1, 2005, on cross-motions for  
23 summary judgment filed by Kathryn Ann Ellis, Chapter 7 Trustee (Trustee), and Ford Motor  
24 Credit Company (Ford). The Trustee seeks summary judgment on her action under 11 U.S.C.  
25 § 547(b), while Ford seeks summary judgment on the defense available under 11 U.S.C.  
§ 547(c).

1 **FINDINGS OF FACT**

2 The facts are not in dispute. On November 4, 2004, Ford obtained a judgment against  
3 Deane and Linda DeLavern (Debtors) for \$9,750.59. On November 23, 2004, Ford recorded  
4 its judgment with the Pierce County Auditor. In December, 2004, the Debtors sought to  
5 refinance their residence. Ford agreed to release its judgment lien in exchange for a partial  
6 payment of the judgment in the sum of \$5,050. Ford's attorney received the payment on  
7 December 16, 2004. The refinance also paid Citibank \$900.18, which had a judgment lien on  
8 the Debtors' home. At the time of the refinance, the residence was valued at \$210,000, and  
9 the mortgage balance was \$191,375.47 according to the Trustee, or \$191,540.49 according to  
10 Ford. The difference in these amounts is not material, and for purposes of summary  
11 judgment, the Court will rely on the Trustee's figure. After the refinance, the mortgage  
12 balance was \$206,250. The Debtors filed bankruptcy under Chapter 7 on March 7, 2005.

13 The Trustee filed the current adversary proceeding on August 9, 2005, alleging a  
14 preferential transfer pursuant to 11 U.S.C. §§ 547(b), 550, and 551. The Trustee filed the  
15 current motion on November 4, 2005. In response, Ford filed its summary judgment motion  
16 on November 15, 2005. After oral argument on December 1, 2005, Ford and the Trustee filed  
17 supplemental pleadings.

18 **CONCLUSIONS OF LAW AND DISCUSSION**

19 The Trustee argues that the only issue before the Court on the Trustee's motion is  
20 whether Ford's judgment lien pursuant to RCW 6.13.090 attached to an interest in property of  
21 the Debtors, rendering Ford a secured creditor at the time of the refinance, or whether,  
22 because of the Debtors' homestead, the lien was unable to attach to the Debtors' property,  
23 rendering Ford an unsecured creditor whose payment can be avoided under 11 U.S.C.  
24 § 547(b). The parties agree that the issue of attachment is one of state law. While there is no  
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1 Washington case directly on point, there is sufficient case law containing applicable analysis  
2 for this Court to determine the issue raised.

3 RCW 6.13.090 provides that “[a] judgment against the owner of a homestead shall  
4 become a lien on the value of the homestead property in excess of the homestead exemption  
5 from the time the judgment creditor records the judgment . . . .” (Emphasis added.) It is  
6 undisputed that when the Debtors refinanced their home, the residence was valued at  
7 \$210,000, and after considering the first mortgage, the Debtors had between \$18,000 and  
8 \$19,000 equity remaining. Pursuant to RCW 6.13.030, the Debtors under state law were  
9 eligible for a homestead exemption up to \$40,000. Thus, the Trustee contends that because  
10 there was no value beyond the homestead exemption to which Ford’s lien could attach, Ford  
11 was unsecured at the time of the transfer and received more than it would have if the transfer  
12 was not made.

13 Ford disagrees with the Trustee’s analysis. Relying on Wilson Sporting Goods Co. v.  
14 Pedersen, 76 Wn. App. 300 (1994), Ford contends that even if there was no value in excess  
15 of the homestead, the judgment lien attached to the Debtors’ property. In that case, the  
16 Washington State Court of Appeals, Division I, considered whether a lien created pursuant to  
17 RCW 6.13.090 attaches only to the “abstract concept of excess value,” or whether it is a lien  
18 on the property itself. Wilson Sporting Goods, 76 Wn. App. at 305. The state appellate court  
19 ruled that a lien is created on the property. Wilson Sporting Goods, 76 Wn. App. at 306. The  
20 court equated a judicial lien under RCW 6.13.090 to a second mortgage, in that the second  
21 mortgage is for a certain amount, but the value of the second mortgage is limited by the value  
22 of the property in excess of the first mortgage. Wilson Sporting Goods, 76 Wn. App.  
23 at 305-06. Similarly, a judicial lien under RCW 6.13.090 is for a specific amount, but the value  
24 is clearly limited by the value of the property in excess of the homestead. In either case,  
25 however, the lien first is created on the property. Under the Wilson Sporting Goods analysis,

1 Ford argues that its lien attached to the Debtors' property even though there was no value in  
2 excess of the homestead.

3 The Wilson Sporting Goods case, however, must be reconciled with two subsequent  
4 Division I cases, In re Deal, 85 Wn. App. 580 (1997) and Sweet v. O'Leary, 88 Wn. App. 199  
5 (1997). In those cases, the state appellate court acknowledged that consistent with the  
6 holding in Wilson Sporting Goods, a lien under RCW 6.13.090 is created on property. In  
7 reconciling their opinions with the Washington State Supreme Court decision in Mahalko v.  
8 Arctic Trading Co., 99 Wn.2d 30 (1983), overruled on other grounds by Felton v. Citizens Fed.  
9 Sav. & Loan Ass'n, 101 Wn.2d 416, 424 (1984), the state appellate court, however, clarified  
10 this holding.

11 The *Mahalko* court said that "[g]enerally speaking, personal judgments  
12 become liens upon the real property of the judgment debtor. RCW 4.56.190-  
13 *Such judgments do not become liens upon real property to which the*  
14 *homestead exemption applies.*" *Mahalko*, 99 Wn.2d at 34, 659 P.2d 502  
(emphasis added). This portion of the *Mahalko* opinion is still good law and was  
not undermined, but rather was confirmed by the subsequent enactment of  
RCW 6.13.090.

15 Deal, 85 Wn. App. at 585. The state appellate court relied on state law that "homestead and  
16 exemption laws are favored . . . and are to be liberally construed." Sweet, 88 Wn. App.  
17 at 204. Subsequent to Deal and Sweet, the state appellate court in an analysis of  
18 RCW 6.13.090, confirmed the special protections afforded homestead property by noting that  
19 "the homesteader has a vested right in the homestead exemption," but not in the value of the  
20 homestead property in excess of the exemption. Robin L. Miller Constr. Co. v. Coltran,  
21 110 Wn. App. 883, 891 (2002).

22 Thus, while a judgment lien is created on property rather than value pursuant to Wilson  
23 Sporting Goods, under the more specific analysis of Deal and Sweet, it cannot attach to  
24 homestead property. In this case, there was no value above the Debtors' homestead  
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1 exemption. Because Ford's judgment lien could not attach to the Debtors' homestead  
2 property, there was no property to which a lien could attach, rendering Ford unsecured at the  
3 time of the refinance. Accordingly, all five requirements of 11 U.S.C. § 547(b) have been met,  
4 and the Trustee is entitled to summary judgment on this issue.

5 Ford contends, however, that releasing its lien constituted new value given as a  
6 contemporaneous exchange of new value, pursuant to 11 U.S.C. § 547(c)(1). Under this  
7 provision, the Trustee may not avoid a transfer that was "(A) intended by the debtor and the  
8 creditor to or for whose benefit such transfer was made to be a contemporaneous exchange  
9 for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange."  
10 11 U.S.C. § 547(c)(1).

11 Relying on a Tenth Circuit case, Kenan v. Fort Worth Pipe Co. (In re George Rodman,  
12 Inc.), 792 F.2d 125, 127 (10th Cir. 1986), Ford asserts that a release of a lien in exchange for  
13 a debtor's payment may be a contemporaneous exchange for new value. The purpose of  
14 11 U.S.C. § 547(c)(1) is to "accomplish proportionate distribution of the debtor's assets among  
15 its creditors, and therefore to prevent a transfer to one creditor that would diminish the estate  
16 of the debtor that otherwise would be available for distribution to all." Fredman v. Milchem,  
17 Inc. (In re Nucorp Energy, Inc.), 902 F.2d 729, 733 (9th Cir. 1990). A payment to a fully  
18 secured creditor is not preferential because the payment does not deplete the bankruptcy  
19 estate. See Committee of Creditors Holding Unsecured Claims v. Koch Oil Co. (In re  
20 Powerline Oil Co.), 59 F.3d 969, 972 (9th Cir. 1995). The Ninth Circuit has recognized that  
21 the release of a security interest to the extent of a payment is one form of "new value" that a  
22 creditor may give in exchange for the debtor's payment. See O'Rourke v. Seaboard Sur. Co.  
23 (In re E.R. Fegert, Inc.), 887 F.2d 955, 959 (9th Cir. 1989). The bankruptcy court, however,  
24 must "measure the value given to the creditor and the new value given to the debtor in  
25 determining the extent to which the trustee may void a contemporaneous exchange." Nucorp

1 Energy, 902 F.2d at 733 (quoting Jet Florida, Inc. v. American Airlines, Inc. (In re Jet Florida  
2 Sys., Inc.), 861 F.2d 1555, 1558-59 (11th Cir. 1988)). "Value should be measured at the time  
3 of the transfer." Sulmeyer v. Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 733 (9th Cir.  
4 1994) (citing Nucorp Energy, 902 F.2d at 733). "The burden of proving the specific measure  
5 of the new value is on the party seeking the § 547(c)(1) shelter." Womack v. Houk (In re  
6 Bangert), 226 B.R. 892, 902 (Bankr. D. Mont. 1998) (citing Grant Chevrolet, 25 F.3d at 733).

7 In this case, the Court has determined that Ford was unsecured at the time of the  
8 refinance. Accordingly, Ford could not release an interest in the Debtors' property that it did  
9 not, in fact, have. The contemporaneous exchange for new value exception, therefore, does  
10 not protect the Debtors' \$5,050 payment, to the extent Ford's interest was unsecured. See  
11 Powerline Oil, 59 F.3d at 973-74. Although Ford's lien may be a cloud on the title, it has no  
12 value and could be removed by a state court proceeding in a quiet title action or by some  
13 other equitable proceeding. See, e.g., Washington Real Property Deskbook, § 23.4(2)  
14 Practice Tip (3d ed. Wash. State Bar Ass'n 1996). Consequently, Ford is not entitled to  
15 summary judgment on the defense available under 11 U.S.C. § 547(c).  
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17 DATED: December 20, 2005

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19 Paul B. Snyder  
20 U.S. Bankruptcy Judge  
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